STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND CHARLES WASHBURN,

Plaintiff-Appellee,

v

WENDY RENEE WASHBURN,

Defendant-Appellant.

UNPUBLISHED
June 15, 1999

No. 204047
Macomb Circuit Court
LC No. 94-002327 DM

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant appeals by leave granted from a judgment of divorce declaring that plaintiff is the equitable parent of nine-year-old Justin and thereby allowing plaintiff visitation with the child. We affirm.

Defendant gave birth to Justin on April 19, 1990. The first birth certificate, issued shortly after Justin's birth, did not name the father. However, the parties married on May 18, 1990, and a second birth certificate was issued naming plaintiff as the father. The parties also filed an affidavit of parentage in the probate court acknowledging that plaintiff was Justin's father.

During the divorce proceedings, blood tests established that plaintiff is not Justin's biological father. Defendant conceded that plaintiff and Justin had always had a mutually acknowledged relationship as father and son and that she had fostered this relationship. Nevertheless, defendant requested that plaintiff's parental rights be terminated because he was not a "good role model" in that he had been abusive toward her and had stolen from employers. Plaintiff argued that his parental rights should not be terminated, claiming parentage under the "equitable parent doctrine" established in *Atkinson v Atkinson*, 160 Mich App 601; 408 NW2d 516 (1987).

On appeal, defendant contends that the trial court abused its discretion when it declared that plaintiff is Justin's equitable parent. We disagree. When reviewing a child custody matter, this Court must affirm the decision of the trial court unless its factual findings are against the great weight of the evidence, its discretionary rulings demonstrate a palpable abuse of discretion, or it has made a clear legal error with regard to a major issue. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994); *York v Morofsky*, 225 Mich App 333, 335; 571

NW2d 524 (1997); *Soumis v Soumis*, 218 Mich App 27, 33; 553 NW2d 619 (1996). Accordingly, this Court must not substitute its judgment for that of the trial court "unless the evidence 'clearly preponderate[s] in the opposite direction.' " *Fletcher*, *supra* at 879, quoting *Murchie v Standard Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959).

Under the "equitable parent doctrine" as promulgated by this Court in *Atkinson*, *supra* at 608-609:

> a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.

Defendant first contends that the equitable parent doctrine is not applicable because plaintiff knew that he was not Justin's father from the time that defendant notified him of the pregnancy, an allegation which is disputed by plaintiff. However, whether or not plaintiff knew that he was not Justin's father is irrelevant to the determination of equitable parent status. "There is no additional factor in the *Atkinson* test requiring that the husband have no knowledge of the fact that his paternity may be in question." *Soumis*, *supra* at 33. Therefore, the fact that plaintiff arguably knew that he was not Justin's father all along does not prevent application of the equitable parent doctrine.

We note that this Court has recently declined to apply the equitable parent doctrine in a situation in which the child was not born or conceived during marriage, as is true in the case at bar. *Van v Zahorik*, 227 Mich App 90; 575 NW2d 566 (1997), lv gtd 458 Mich 865 (1998). However, the *Van* Court based its decision on the fact that the parties had never married, emphasizing the lack of a "legally recognized relationship" between the child's mother and the putative father and noting its concern that "multiple third parties" with "no legal relationship to the mother or child" might flood the courts asking for equitable parent status. *Id.* at 97-99. On the contrary, in the instant case, the parties were married from the time Justin was one month old until he was four years old. Additionally, unlike the parties in *Van*, here the parties executed a sworn affidavit of parentage, as well as a birth certificate, declaring that plaintiff is Justin's father. Therefore, because *Van* is factually distinguishable from the case at bar, we find that this Court is not required by MCR 7.215(H) to apply its holding in this matter to deny plaintiff the benefit of the equitable parent doctrine.

Defendant next contends that the trial court erred in considering plaintiff's actions before the divorce action commenced as a factor in its decision that plaintiff "is willing to take on the responsibility of paying child support," the third *Atkinson* requirement. In so finding, the trial court stated that plaintiff's poor child support payment record during the two years following the institution of divorce proceedings must be weighed against his provision of support for the four previous years. In *York*,

supra, this Court held that the trial court had "misapplied the test" for determining equitable parent status and erred in rejecting the defendant's equitable parent claim when it "focused only on defendant's actions *after* the filing of the divorce action" and "ignored defendant's role in supporting the child for the first four years of his life, before plaintiff filed for divorce . . . ." *Id*. at 335-336. Pursuant to *York*, therefore, the trial court did not err in considering, and, indeed, was required to consider, plaintiff's actions in providing support for Justin during the years prior to the filing of the divorce action.

Defendant also asserts that the trial court erred in considering plaintiff's payment of child support after trial commenced as sufficient evidence of fulfillment of the third *Atkinson* factor. However, defendant fails to provide any support for this position, and it is not apparent that the court clearly erred in considering the fact that plaintiff had paid nearly all of the child support he was charged during 1996. While the trial court conceded that the payments were largely made after plaintiff sought equitable parent status, it apparently believed that plaintiff's recent payment record, combined with the support he provided Justin during the parties' marriage, provided sufficient proof that he was willing to take on the responsibility of paying child support.

Next, defendant contends that the court erred in finding that plaintiff had met the second *Atkinson* requirement; that is, that he "desires to have the rights afforded to a parent." Defendant contends that the evidence of plaintiff's bizarre behavior and manipulation of the truth shows that, aside from visitation rights, he does not desire to have any other rights of a parent, such as that of a role model, friend, advisor, and source of security. The trial court found that the defense witnesses' testimony "seriously attacked the [credibility] of the plaintiff" and stated its belief that "plaintiff is not a reputable person of good character." The trial court found, however, that

> despite all of that testimony, it was clear to this Court that the plaintiff father has expressed and acted upon his desire to be the parent of Justin. At the time of the birth, he visited the child at the hospital, [sic] the parties lived together as husband and wife and parents of Justin for approximately four years with mutual sharing of parental responsibilities. The plaintiff has continued to request his rights as a parent for visitation with Justin. Regardless of his credibility on the issues presented to the Referee and to this Court, his credibility on this issue by his actions and statements establish [sic] his desire to have the rights afforded to a parent.

The evidence of plaintiff's unsavory behavior, while substantial, does not "clearly preponderate" against the trial court's finding that plaintiff desires to have the rights afforded to a parent. *Fletcher*, *supra* at 879.

Defendant next contends that plaintiff is precluded under MCL 722.26c; MSA 25.312(6c) from having standing to claim parental rights in this case. However, defendant's reliance on this statute is misplaced for a number of reasons. Contrary to her assertion, this provision does not introduce "new restrictions" into the Child Custody Act. Rather, it "expand[s] the class of persons eligible to bring a custody action." *In re Ramon*, 208 Mich App 610, 612; 528 NW2d 831 (1995). Furthermore, it is wholly inapplicable to the case at bar. First of all, the statute applies to third persons who wish to "bring an action for custody of a child." Plaintiff did not "bring an action for custody." Rather, he filed

for divorce, and, pursuant to MCL 552.16; MSA 25.96, the trial court was authorized upon entering a judgment of divorce to enter such orders as it considered just and proper concerning the custody of the parties' minor children. *Sirovey v Campbell*, 223 Mich App 59, 76; 565 NW2d 857 (1997). Moreover, custody was not even at issue in the case at bar. Rather, it was stipulated prior to trial that defendant would have sole legal and physical custody of Justin.

Finally, defendant contends that it is not in Justin's best interest to allow plaintiff to have visitation. The child's best interests are of major concern in determining whether a party is an equitable parent. *York*, *supra* at 338. While the trial court stated its belief that plaintiff was not a "reputable person of good character," it further stated that "factors such as this are present in every marriage resulting in a breakdown and divorce and parents are not deprived of parenthood of minor children because of such actions." Defendant conceded that Justin had never come to any harm when in the care of plaintiff. Plaintiff's testimony and actions in fighting for equitable parent status show that he is committed to fatherhood. Defendant is the only father Justin has known. It cannot be said that terminating plaintiff's parental rights at this point—after he has had a father-child relationship with Justin for over eight years—could be in the child's best interest. For these reasons, we agree with the trial court's determination that plaintiff is Justin's equitable parent.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski